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Supreme Court, U.S.
FILED
DEC 10 2001
CLERK

No. 00-6029

In The

Supreme Court of the United States

TRACY RAGSDALE, et al.,

Petitioners,

v.

WOLVERINE WORLDWIDE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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24 pp

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I. UNDER SECTION 2654 THE SECRETARY OF LABOR HAS THE AUTHORITY TO REQUIRE EMPLOYERS AND EMPLOYEES TO PROVIDE NOTICE AND INFORMATION TO ONE ANOTHER

Respondent presents an assault on the FMLA regulations far more sweeping than the opinion of the court of appeals. The Eighth Circuit held that the notice and designation requirement in 29 C.F.R. § 825.208(a) would be valid in any case in which the employee actually has a need for that information. (J. App. 104-05). Respondent, on the other hand, contends that a notice requirement like section 825.208 is invalid regardless of whether the employee in fact needs the information that it would provide.

Respondent argues that the Secretary of Labor cannot impose on either employers or employees *any* notice or information requirements beyond the provisions contained in the text of the statute. (R.Br. 29-30). According to respondent, Congress, except in those instances specifically addressed in the statute itself, simply did not care whether employees ever received information that would enable them to utilize or plan the use of FMLA leave. (R.Br. 23, 27).

Respondent's argument would eviscerate large portions of the FMLA regulations, including numerous provisions that are of substantial practical importance to employers. The FMLA regulations are replete with requirements, not found in the text of the statute itself, that employees and employers provide notice or information to one another. The obligations imposed on

employees serve to reduce the burdens and inconvenience that FMLA leave might otherwise pose for employers. The requirements established for employers assure that employees have the information needed to exercise their rights and to meet their obligations under the FMLA. These often inter-related provisions operate to facilitate cooperation and consultation between employers and employees. "The regulations expec[t] disputes to be resolved through discussions between the employee and the employer at the beginning of the leave rather than at the end." 60 Fed. Reg. 2180, 2207 (Jan. 6, 1995).

Section 2612(e) of the FMLA requires FMLA-eligible workers to provide employers with notice of their "intention to take leave." The regulations, however, direct employees seeking FMLA leave to do significantly more. Under the regulations a worker must also give his or her employer sufficient information "to allow the employer to determine that the leave qualifies under the Act." 29 C.F.R. § 825.208(a)(1).[1] The employee must indicate the "timing and anticipated duration of the leave." 29 C.F.R. § 825.302(c).[2] Once the employee is on leave, he or she is

[1] The FMLA contains no requirement that an employee provide information in connection with leave under section 2612(a)(1)(A) (leave to care for a newborn child) or section 2612(a)(1)(B) (leave because of the placement of a foster child.) With regard to health related leave under sections 2612(a)(1)(C) and 2612(a)(1)(D), an employer is authorized by the statute only to require information in the form of a medical certification. 29 U.S.C. § 2613.

[2] The statute does not require an employee seeking leave under sections 2612(a)(1)(A) or 2612(a)(1)(B) to provide any

required to provide notice "if dates of scheduled leave change or are extended." 29 C.F.R. § 825.302(a). If the employee is seeking intermittent leave, he or she must provide the employer with information detailing "why the intermittent . . . leave schedule is necessary", 29 C.F.R. § 825.302(f),[3] and with notice regarding any changes in the schedule. 29 C.F.R. § 825.302(a). An employee may be obligated to give his or her employer notice two days prior to returning to work, 29 C.F.R. §§ 825.309, 825.312(e).

The notification duties imposed on employers by the regulations are of three distinct kinds.[4] First, the

information about the expected duration of the leave. Where an employee seeks leave under section 2612(a)(1)(C) to care for certain relatives, the employer may require a medical certification stating how long the employee will be *needed* to care for that relative. 29 U.S.C. § 2613(b)(4)(A). It does not require a statement as to the amount of the expected leave, which could of course be a shorter period. For example, a doctor's statement that the employee was needed to care for the relative indefinitely would not inform the employer how long the leave would last. In the case of leave under section 2612(a)(1)(D), where the employee has a serious medical condition and is unable to work, the medical certification must state that the worker *is* unable to work, and explain how long the underlying condition will last, but the certification need not address whether (as will frequently occur) the need for leave might end at some point prior to the worker's complete recovery from the underlying medical condition. 29 U.S.C. §§ 2613(b)(2), 2613(b)(4)(B).

[3] The statute itself permits the employer to require a medical certification that intermittent or reduced schedule leave "is necessary", not *why* that is so. 29 U.S.C. § 2613(b)(4)(B)(7).

[4] In addition to the more specific notification requirements described *infra*, the employer is required to include a summary

employer must provide workers with information about their rights under the FMLA. In addition to requirements of general information, e.g., 29 C.F.R. § 825.301(a)(1), the regulations identify certain specific rights which must be mentioned. E.g., 29 C.F.R. § 825.301(b)(1)(iii) (right to substitute paid leave for FMLA leave).[5] Second, the employer is required to alert employees to their numerous obligations under the FMLA, including their duties to provide advance notification of the need for leave,[6] their obligation while on leave to pay a share of health benefit premiums,[7] the possible need to provide a fitness-for-work certification when they return from medical leave,[8] their responsibility to give the employer two days notice prior to returning to work,[9] and their possible liability for the employer's medical benefit costs if they do not ultimately return to work.[10] Third, the employer is required to provide where relevant certain information

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of the employee's FMLA rights and obligations in any written employee handbook, 29 C.F.R. § 825.301(a)(1), and to respond to an employee's questions about those rights and duties. 29 C.F.R. § 825.301(d).

[5] See 29 C.F.R. §§ 825.110(d) (date when employee will become eligible for FMLA leave), 825.209(d) (right to change medical benefit plans).

[6] 29 C.F.R. § 825.304(i).

[7] 29 C.F.R. §§ 825.210(d), 825.301(b)(1)(iv).

[8] 29 C.F.R. §§ 825.301(b)(1)(v), 825.310(e).

[9] 29 C.F.R. § 825.309(c).

[10] 29 C.F.R. § 825.301(b)(1)(viii).

which an employee may need to exercise his or her rights under the FMLA.[11]

The most important notification required of employers occurs when the employer learns that a worker needs leave that meets the requirements for FMLA leave. The regulations provide a list of rights and duties that must be called to the employee's attention at that time, 29 C.F.R. § 825.301(b), and the Secretary of Labor has issued a model form (WH-381) which an employer can use for this purpose. (See Brief Appendix). Four of the eight elements of the section 825.301(b) notice concern an employee's obligations under the FMLA.[12] Notice that an employer has (or has not) designated an employer-sponsored leave plan as also constituting FMLA leave is one of the elements of the section 825.301(b) notice.

The Secretary has reasonably concluded that the implementation of the FMLA requires such exchanges of information. The statute imposes obligations on and

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[11] 29 C.F.R. §§ 825.200(d)(1) (method used by employer to calculate one year period under FMLA), 825.200(e) (same), 825.212(a)(1) (employer intent to end medical benefits because employee has failed to pay premiums), 825.219(a) (designation of employee as a "key" employee and explanation of potential consequences), 825.301(b)(1)(vi) (same), 825.307(d) (copies of medical opinions obtained by employer).

[12] 29 C.F.R. §§ 825.301(b)(1)(ii) (duty to provide medical certification of a serious health condition), 825.301(b)(1)(iv) (employee's obligation to pay health benefit premiums), 825.301(b)(1)(v) (employee's obligation to provide a fitness-for-duty certificate in order to be restored to employment), 825.301(b)(1)(vii) (employee's potential liability for employer's share of health benefit premiums).

accords rights to employers and employees alike; it will ordinarily be the case that employers and employees need information from one another in order to meet their respective obligations and exercise their respective rights. This system frequently operates to the considerable advantage of employers. The information required from employees will permit the employer to plan personnel matters. In addition, employees with the requisite information are more likely to meet their statutory obligations to their employers.

The FMLA cannot fairly be read to preclude the Secretary from requiring employees and employers to provide such information to one another. The fact that the FMLA itself does identify some such notices or information reflects only a congressional decision to establish certain minimum information that must be provided, not to preclude the Secretary from requiring more. Having delineated several types of information that it concluded were clearly important, Congress left to the Secretary the task of identifying other necessary information.

It cannot be the case, as respondent suggests, that Congress did not care whether employees (or employers) lacked the sort of information required by the regulations, and had no interest in whether workers could use such information to plan their leaves. Without such information and planning, the substantive rights accorded by the Act would be meaningless. Section 2612(b), for example, guarantees workers with a serious health condition the right to take FMLA leave on a part-time basis. Congress assuredly realized that section 2612(b) would be entirely ineffective if workers did not actually *know* that they were entitled to work part time under the FMLA, and it would have understood that few employees would

be able on their own to learn that federal law accorded them such a right.

Effective implementation of the FMLA obviously requires that employees have timely information about their rights under the statute. The only information guaranteed to workers by the FMLA itself is that contained in the poster required by section 2619, and certain warnings to high level employees who may be outside the statutory right of restoration. 29 U.S.C. § 2614(b)(1)(B). Congress could not possibly have believed that these two provisions alone would be sufficient to enable workers to learn of and exercise their rights, and cannot have intended to forbid the Secretary to require more.

II. THE RIGHTS ACCORDED TO EMPLOYEES UNDER THE FMLA ARE NOT LIMITED TO TWELVE WEEKS OF LEAVE

Respondent's attack on the validity of the FMLA regulations rests largely on a clear, pivotal, and palpably erroneous premise – that the sole right accorded to workers under the FMLA is a total of twelve weeks (per year) of leave for one of the statutory purposes.[13] On respondent's view an employer has fully met its obligations under the Act if during the year it has provided a worker with twelve weeks of leave, regardless of what the terms or conditions of that leave may have been. Since petitioner received more than twelve weeks of leave, respondent argues, the company fully satisfied its statutory obligations. Because it had completely complied

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[13] R.Br. 5, 9, 12, 25, 32, 38, 40.

with the FMLA, Wolverine insists, the regulations could not validly require it to do more.

The terms of the FMLA, however, expressly provide employees with five important rights in addition to twelve weeks of leave. First, certain employees (including petitioner) are entitled to work either part time or intermittently. 29 U.S.C. § 2612(b). This permits such employees to extend the period during which they are not working full time, and enables them to earn a substantial income. Thus an employee who was able to work an average of 20 hours of her regular 40 hour workweek could remain on leave for a total of 24 weeks, during which she would earn 12 weeks of wages. Second, all employees, if offered only unpaid leave, are entitled to substitute paid leave, such as vacation leave. 29 U.S.C. § 2612(d). Although this does not extend the total period of leave, it can result in significant income. Third, the FMLA limits the amount of medical information which an employee can be required to provide, and restricts the frequency with which it must be reconfirmed. 29 U.S.C. § 2613. Fourth, an employee returning from leave protected by the FMLA has a bundle of specific restoration rights; he or she must be restored to the same or an equivalent position and his or her accrued employment benefits cannot be reduced. 29 U.S.C. § 2614(a). Fifth, an employer must continue to provide health benefits under the same terms and conditions that would have existed had the employee continued to work. 29 U.S.C. § 2614(c).

Notification is an important aspect of compliance with the FMLA. Two of the FMLA ancillary rights – the right to work part time and the right to substitute paid leave – are options which must be affirmatively exercised

by an employee. Unlike, for example, continued health insurance coverage, which an employer can and must provide independent of any action or knowledge on the part of the worker, an employee must ask to work part time or to substitute paid leave. There is little chance that an employee will do so if he or she does not know that these options exist, particularly if the employee has not been notified that the employer has designated the leave as FMLA leave.

More broadly, by notifying an employee that he or she is being accorded FMLA leave, an employer commits itself to providing to the worker all of the ancillary FMLA rights, and simultaneously alerts the employee to the need to monitor whether the employer is in fact providing those rights. The bundle of rights provided by a company sponsored plan will often be inferior in at least some respect (although perhaps more generous in others) to the FMLA rights.[14] To the degree that the company-plan rights are more limited, notification that a worker is on FMLA leave is a commitment by the employer to provide those more generous FMLA ancillary rights.

The absence of section 825.208(a) notice in this case was entirely deliberate. No such notice was given precisely because Wolverine officials insisted that Ragsdale was *not* entitled to FMLA leave, and thus was not entitled to any ancillary FMLA rights more generous than the

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[14] In the instant case, for example, Wolverine's leave policy does not permit intermittent or reduced schedule leave, does not permit substitution of paid leave, and requires periodic medical recertification not necessary for FMLA leave.

company's own plan. The company's decision not to notify Ragsdale that she was receiving FMLA leave was part and parcel of the employer's decision not to accord her those FMLA rights.

Respondent mistakenly insists that Congress intended that the FMLA never result in more than twelve weeks of leave. To the contrary, the FMLA can require just that result in a number of distinct circumstances. (1) Under section 2612(d), a period of unpaid FMLA leave cannot reduce a worker's pre-existing accrued paid leave unless the worker (at his or her own initiative or at the demand of the employer) has substituted that paid leave for FMLA leave. In the absence of such substitution, the FMLA itself guarantees that at the end of the twelve week FMLA period the employee can remain on leave for an additional period equal to his or her earlier accrued entitlement. (2) If an employer requires a worker to be on leave during a period when he or she is in fact willing and able to work – such as by not allowing part time work under section 2612(b), or by requiring certain school employees to go on leave toward the end of the academic year, see section 2618 – that involuntary leave does not count towards the worker's FMLA entitlement. 29 C.F.R. §§ 825.203(d), 825.204(e), 825.303(b). (3) Under certain circumstances the provisions of the Fair Labor Standards Act forbid including certain leave periods as part of the FMLA period. 29 C.F.R. §§ 825.207(b), 825.208(i). In all of these situations enactment of the FMLA can result in total leave periods in excess of twelve weeks.

In the instant case, the months of company-sponsored leave, although substantially greater in length than

twelve weeks, did not include a number of the ancillary rights that are legally mandated elements of FMLA leave. (See n. 14, *supra*). Wolverine declined to notify Ragsdale that she was on FMLA leave precisely because they insisted that she was neither on such leave nor entitled to the ancillary FMLA rights. Nothing in the language of the FMLA required, or necessarily permitted, treating such a period of company-sponsored leave as FMLA leave.

III. THE REGULATIONS AT ISSUE IN THIS CASE ARE REASONABLE

Sections 825.208(c) and 825.700(a) provide that company-sponsored leave will not be counted against an employee's FMLA entitlement unless the employer has designated that company-sponsored leave as also being FMLA leave and has so notified the employee. Respondent argues that this provision constitutes a "penalty" imposed on employers as a sanction for violating the designation and notice requirements of section 825.208(a). Respondent objects that the only penalty expressly authorized by the statute itself is the $100 sanction for violations of the poster requirement of section 2619. (R.Br. 5-6, 30-32).

The manifest purpose of section 825.700(a), however, is not to punish employers, but to assure that employees do not lose their FMLA rights, or a meaningful opportunity to exercise them, because of an employer's failure to comply with section 825.208(a). There are numerous other provisions of the FMLA regulations which, like section 825.700(a), adversely alter a party's legal rights because it has failed to provide certain information or

notice. If section 825.700(a) constitutes a legally impermissible "penalty," these other provisions would also be invalid. Most of these similar provisions benefit employers by limiting the rights of employees who have failed to provide notice or information to their employers.

An employee who does not give an employer information needed to establish FMLA eligibility can be denied FMLA leave, even though he or she is in fact eligible.[15] 29 C.F.R. § 825.208(a)(1). An employee who does not accord an employer advance notice of a foreseeable leave can be required to await an additional thirty days before beginning that leave. 29 C.F.R. § 825.304(b); see 29 C.F.R. § 825.601(b).[16] Employees who do not provide advance notice of their intent to return to work can be forced to remain on leave for an additional two days. 29 C.F.R. §§ 825.310(e), 825.312(e). An employee who at the end of a twelve-week leave period is still too ill to return to work ordinarily need not reimburse the employer for health benefit premiums paid by the employer during the leave; if, however, the worker fails within thirty days to provide the employer with a requested medical certification of continued incapacity, the worker will be liable for those costs. 29 C.F.R. § 825.213(a)(3). Similarly, the regulations provide that an employer which has failed to notify a worker of some

[15] In many circumstances the FMLA itself does not require the employee to provide such information. See n. 1, *supra*.

[16] Although section 2612(e) requires an employee to provide such advance notice, it does not by its terms permit an employer to delay leave because the worker has not done so.

employee obligation under the FMLA cannot complain if the employee fails to meet that obligation.[17] All of these regulations are reasonably framed "to carry out" the FMLA. 29 U.S.C. § 2654.

Respondent appears to suggest that it would be difficult for an employer to comply with the requirement of section 825.208(a) that it notify an employee that it has designated leave as FMLA leave. Such notification, however, could be provided in a single sentence. Several years before this action arose, the Secretary published a proposed form for use by employers in responding to leave requests. (Form WH-381, 29 C.F.R. pt. 825 App. D; Brief Appendix). An employer using this form can provide notification simply by checking a box on numbered statement 2. (See Brief App. 2). At least for a large employer like Wolverine Worldwide,[18] both the requirements of the federal regulations and the possible use of this officially approved form should have been readily apparent.

Finally, respondent suggests that employers will be deterred from according to employees more than twelve weeks of company-sponsored leave because of the risk that they will have to provide at the end of the company-sponsored leave an additional twelve weeks of FMLA leave. (R.Br. 4, 28). Such a risk, however, could be realized only if an employer, ignorant of the requirements of section 825.208(a)(1), failed to provide the requisite

[17] 29 C.F.R. §§ 825.300(a), 825.301(f), 825.304(i), 825.305(a), 825.310(e).

[18] See http://www.wolverineworldwide.com (company has 4,000 employees and annual sales of $700 million).

notice. But any employer concerned that ignorance of section 825.208(a)(1) might lead to consecutive leaves would *by definition* know what that very section requires. It is difficult to understand why such an informed employer would be concerned that failure of notification might occur. Any employer can definitively assure that company-sponsored and FMLA leave will run concurrently simply by providing notice using form WH-381 or by including a single sentence in any company-framed notice. Because the overwhelming majority of leaves taken under the FMLA are quite short,[19] it is exceedingly unlikely that any employer would actually be concerned about the hypothetical problem posited by respondent.[20]

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[19] D. Cantor, et al. & U.S. Dep't of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys* 2-3 (Jan. 2001) (median FMLA leave is 10 days).

[20] In the instant case, respondent itself decided to provide seven months of unpaid sick leave despite the existence of the regulations in question.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX D TO PART 825 – PROTOTYPE
NOTICE: EMPLOYER RESPONSE TO EMPLOYEE REQUEST FOR FAMILY AND MEDICAL LEAVE (FORM WH-381)

Employer Response to Employee Request for Family or Medical Leave
(Optional use form – see 29 CFR §825.301(c))

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

(Family and Medical Leave Act of 1993)

(Date)

TO: _____
(Employee's name)

FROM: _____
(Name of appropriate employer representative)

SUBJECT: Request for Family/Medical Leave

On _____ (*date*), you notified us of your need to take family/medical leave due to:

[ ] the birth of your child, or the placement of a child with you for adoption or foster care; or

[ ] a serious health condition that makes you unable to perform the essential functions of your job; or

[ ] a serious health condition affecting your [ ] spouse, [ ] child, [ ] parent, for which you are needed to provide care.

You notified us that you need this leave beginning on _____ (*date*) and that you expect leave to continue until on or about _____ (*date*).

Except as explained below, you have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month

period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (*check appropriate boxes; explain where indicated*)

1. You are [ ] eligible [ ] not eligible for leave under the FMLA.

2. The requested leave [ ] will [ ] will not be counted against your annual FMLA leave entitlement.

3. You [ ] will [ ] will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by _____ (*insert date*) (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We [ ] will [ ] will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (*Explain*)

5 (a) If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: (*Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.*)

(b). You have a minimum 30-day (*or, indicate longer period, if applicable*) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, *provided* we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We [ ] will [ ] will not pay your share of health insurance premiums while you are on leave.

(c). We [ ] will [ ] will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you [ ] will [ ] will not be expected to reimburse us for the payments made on your behalf.

6. You [ ] will [ ] will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until the certification is provided.

7 (a). You [ ] are [ ] are not a "key employee" as described in §825.218 of the FMLA regulations. If you are a "key employee," restoration to employment may be denied following FMLA leave on the

grounds that such restoration will cause substantial and grievous economic injury to us.

(b). We [ ] have [ ] have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. (*Explain (a) and/or (b) below. See §825.219 of the FMLA regulations.*)

8. While on leave, [ ] will [ ] will not be required to furnish us with periodic reports every ___ (*indicate interval of periodic reports, as appropriate for the particular leave situation)* of your status and intent to return to work (*see §825.309 of the FMLA regulations).* If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you [ ] will [ ] will not be required to notify us at least two work days prior to the date you intend to report for work.

9. You [ ] will [ ] will not be required to furnish recertification relating to a serious health condition. (*Explain below, if necessary, including the interval between certifications as prescribed in §825.308 of the FMLA regulations.*)

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December 1994